

(1993) 04 BOM CK 0021

In the Bombay High Court

Case No : First Appeal No. 1086 of 1991 with First Appeal No. 121 of 1993 with Cross Objections No. 8695 of 1993 in First Appeal No. 121 of 1993

A.L. Ranjane and Others

APPELLANT

Vs

Ravindra Ishwardas Sethana and Others

RESPONDENT

Date of Decision : 26-04-1993

Acts Referred:

Bombay Municipal Corporation Act, 1888 — Section 223, 313, 527(1)
Constitution of India, 1950 — Article 19(1)

Citation : AIR 1994 Bom 106 : (1993) 95 BOMLR 168

Hon'ble Judges : M.L. Dudhat, J

Bench : Single Bench

Advocate : P.B. Sawant, for the Appellant; Y.S. Jahangirdar and H.C. Mehta and N.V. Walawalkar, for the Respondent

Judgement

1. First Appeal No. 1086 of 1991 and First Appeal No. 121 of 1993 have been filed against the judgment and decree dated 29th/30th August, 1988 passed by the City Civil Court at Bombay, in Short Cause Suit No. 948 of 1983. Against the first appeal preferred by the Municipal Corporation, respondent No. 1 has preferred cross-objections. I am disposing of both the aforesaid first appeals and cross-objections by this common judgment.

2. Few facts which are material for the purpose of disposing of these first appeals are as under:--

Respondent No. 1 in First Appeal No. 1086 of 1991 who is the original plaintiff, is the owner of the property house bearing No. 535, Kalbadevi Road, Bombay, known as Kanta Terrace. The plaintiff is residing in the said property on the 3rd floor and part of 4th floor. On the ground floor of the said property there are shops. This building faces Kalbadevi Road and adjoining to the northern side of this building is a street called Jambulwadi. Kalbadevi road is running just opposite to this building in north-south direction. Jambulwadi is a bye-lane or a street adjoining to the northern side of the building running in east-west

direction. Jambulwadi is about 33 ft. width and in length is about 125 ft. from Kalbadevi road. From western side i.e. from Kalbadevi road, the said Jambulwadi street comes to a dead end on the eastern side. It is the case of the plaintiff the present respondent No. 1 that at the junction inside Jambulwadi the present appellant original defendant No. 3 constructed a stall at a distance of about 2 ft. from his building. In the said stall defendant No. 3 -- the present appellant started carrying on a tea stall. It is the case of the plaintiff that defendant No. 3 has unauthorisedly constructed the aforesaid stall and is carrying on the said tea stall. The plaintiff, therefore, filed the aforesaid suit for the declaration that the stall erected by the 3rd defendant is an authorised structure and sought a mandatory order against the defendants to remove the said structure. The plaintiff also asked for permanent injunction restraining defendant no. 1 from allowing the said stall to continue to remain in the vicinity of the plaintiff's property.

3. Defendants Nos. 1 and 2 filed the written statement and they contended that defendant No. 3 was carrying on sugarcane juice business from the year 1970 at the same place where defendants Nos. 1 and 2 granted permission to defendant No. 3 to construct the stall. According to defendants Nos. 1 and 2 subsequently in the year 1982 defendant No. 3 sought permission to allow him to construct the stall for carrying on tea stall and after taking into consideration the situation where defendant No. 3 was asking for construction of stall and after taking into consideration the factor as to whether the said stall, if allowed, will cause traffic obstruction, respondent No. 2 granted him permission to construct the stall and gave him licence to prepare the tea and serve the tea. It is also contended on behalf of defendants Nos. 1 and 2 that while granting the aforesaid licence and permission defendant No. 1 also put certain conditions in the permission through their Health Department from the hygienic point of view. It was further contended on behalf of defendants Nos. 1 and 2 that the permission granted by defendants Nos. 1 and 2 to install the stall is perfectly legal and there is no substance in the allegations made by the plaintiff.

4. Defendant No. 3 also filed his written statement wherein he contended that from the year 1970 he was carrying on sugarcane business at the place where he obtained permission to construct the tea stall. However, he was not in a position to meet the two ends in the said business. Defendant No. 3, therefore, applied to defendant No. 2 for considering his request to allow him to construct the tea stall and start the tea stall. After lot of correspondence defendant No. 3 was successful in getting permission and licence from respondent No. 2 and in pursuance of the said permission he constructed the said shop. He further contended that thereafter he obtained no objection from defendants Nos. 1 and 2 for getting electricity connection and water connection and in the year 1984 obtained no objection from defendant No. 1. In the light of these circumstances, it was contended on behalf of defendant No. 3 that he was not raised any unauthorised construction but the tea stall installed by him in Jambulwadi lane was as per the permission granted by respondents Nos. 1 and 2.

5. As against the contentions raised by the plaintiff that the said structure of the tea stall obstructs the enjoyment of light and air of the plaintiff and also his right of easement, it was contended on behalf of defendant No. 3 that ingress and egress of the plaintiff is on Kalbadevi road and not on Jambulwadi road and that his stall does not obstruct light and air as the plaintiff resides on 4th floor and the tenant using the shop immediately behind the stall has and had no objection. Thus it was contended on behalf of defendant No.3 that there is no substance in the contentions raised by the plaintiff in his plaint.

6. On the basis of the aforesaid written statements, it was contended on behalf of defendants Nos. 1, 2 and 3 that the suit filed by the present plaintiff may be dismissed as there was no substance in the contentions raised by the plaintiff.

7. Thereafter both the sides led evidence and produced their documents. The trial Court, after going through the said documents and after scanning the evidence, came to the conclusion that the stall constructed by defendant No. 3 was unauthorised and, therefore, by his judgment and decree dated 29th/30th August, 1988 gave the declaration that the suit structure put up by the 3rd defendant is an unauthorised structure and also an encroachment on the plaintiffs rights and property and passed mandatory injunction against the defendants to remove the suit structure and also granted permanent injunction restraining defendants Nos. 1 and 2 from allowing suit structure to remain in the vicinity of the plaintiffs property and also restraining defendants Nos. 1 and 2 from permitting or sanctioning and allowing any shed or stall structure to be put up in the vicinity of the plaintiffs property.

8. Being aggrieved by the aforesaid judgment and decree dated 30th August, 1988 defendant No. 3 preferred appeal being First Appeal No. 1228 of 1988 and defendants Nos. 1 and 2 also preferred First Appeal No. 1273 of 1988. When the aforesaid appeals came up for final hearing on 14th January, 1991 the High Court set aside the judgment and decree passed by the City Civil Court Judge dated 30th August, 1988 and remanded the matter back with a direction to the trial Court to decide the following issues:--

"(3) Whether the plaintiff proves that the existence of the suit stall affects the traffic ingress and egress to the plaintiffs building?

(4) Whether the plaintiff proves that the existence of the suit stall has affected the light and air to his building and affects the plaintiff during monsoon due to the rain water that falls on the suit stall?"

However, it is pertinent to note that though the High Court had set aside the judgment and decree passed by the City Civil Court dated 29th/30th August, 1988, still the High Court had not considered the rival contentions of both the parties on rest of the issues decided by the trial Court in its judgment dated 30th August, 1988.

9. After the remand the City Civil Court by its judgment dated 9-9-1991 decided

both the issues viz., issue Nos. 3 and 4 against the plaintiff, against which defendant No.3 has preferred First Appeal No. 1086 of 1991, as while setting aside the judgment and decree dated 29th/30th August, 1988 passed by the City Civil Court, the High Court had not given findings on the other issues. Defendants Nos. 1 and 2 also preferred appeal being First Appeal No. 121 of 1993. The plaintiff also preferred cross-objections in First Appeal No. 121 of 1993. Now by this common judgment I am disposing of both these appeals and cross-objections.

10. It is the case of the plaintiff that the permission to the said structure installed by defendant No. 3 was given by defendant No. 2 at the connivance of the Ward Officer. Further according to the plaintiff while granting the aforesaid permission the second defendant had not taken into consideration the rules and bye-laws of the 1st defendant and the said wooden stall is put up on the road in contravention of easementary rights as regards air, light, ventilation and privacy of the plaintiff as the owner. It was also contended by the plaintiff that the said stall installed by defendant No. 3 causes annoyance, nuisance apart from being an encroachment on his property. These are the various contentions raised by the plaintiff in his plaint.

11. In order to substantiate his contentions, the plaintiff has examined himself as a sole witness. In his deposition the plaintiff has stated that the stall installed by defendant No. 3 is at the entrance of Jambulwadi touching his building. According to him, prior to 1982 there was a small sugarcane crusher where the present stall is constructed by defendant No. 3. Defendant No. 3 was carrying on his sugarcane juice business on a structure of 1 metre x 3/4 metre. Somewhere in the beginning of March, 1982 the plaintiff noticed the present stall and, therefore, on 4th March, 1982 the plaintiff addressed a letter to the Ward Officer "C" Ward. The copy of the said letter was also sent to the Deputy Commissioner of Police, Traffic. The plaintiff thereafter personally met the Municipal Commissioner on or about 11th March, 1982 and also on 27th April, 1982 and explained to him the factual position. The Municipal Commissioner thereafter sent him a letter dated 19th May, 1982 stating in it that if the plaintiff did not receive any reply from the concerned Ward Officer, he should go and see the Ward Officer. On 9th June, 1982 the plaintiff received reply from the Ward Officer. In the said letter the Ward Officer informed the plaintiff that the tea stall was permitted in lieu of sugarcane crusher and that action is initiated against the owner of the stall for irregularities committed by him during the erection of the stall. The plaintiff, therefore, gave notice under Sec. 527 of the Bombay Municipal Corporation Act of 1888 and thereafter filed the present suit. In his deposition he has further stated that defendant No. 3 has installed a storage tank adjoining the structure and obtained water connection and also obtained electric supply. In para 4 of his deposition, the plaintiff also "stated that by this structure one of the windows of corner shop of his building is completely blocked. He has further stated that the tea stall was not in compliance with the rules and bye-laws of the Building Regulations of the Bombay Municipal Corporation.

12. On going through the aforesaid evidence, the trial Court by its decision dated 9th September, 1991 decided Issues Nos. 3 and 4 against the present plaintiff by coming to the conclusion that the tea stall does not affect the traffic, ingress and egress to the plaintiff's building and that the said tea stall does not affect light and air to his building or affect the plaintiff during monsoon due to the rain water that falls on the stall.

13. I will like to first deal with the arguments as advanced by Shri Jahagirdar, learned Counsel on behalf of the plaintiff in his cross-objections, which the plaintiff has filed in First Appeal No. 121 of 1993.

14. It is an admitted position that the plaintiff is residing on the 4th floor and, therefore, there is no question of any obstruction of any air and light by the aforesaid suit stall on the 4th floor where the plaintiff is residing. The plaintiff has not examined any witness to show that in fact there is any obstruction to the air and light because of the said structure. Apart from that defendant No. 3 has produced one certificate dated 22nd April, 1982 given by R. C. Mehta and Co. R. C. Mehta and Co. is a tenant of the plaintiff who is occupying a shop just behind the suit stall. The plaintiff in his deposition in para 4 has stated that one of the windows of the corner shop of his building is completely blocked and the door adjoining the window is also blocked. The said portion of the building was being used by R. C Mehta and Co. who in his certificate has stated that he is a tenant of corner shop of Karta Terrace building. There is a window on the corner of Jambulwadi in his shop which is not used or opened any time since he occupied the aforesaid shop from 1962 till the date of the certificate dated 22 April, 1982. He has further stated that he has no intention to use the said window at present and in future. He has further stated in the said certificate that the side entrance door in Jambulwadi No. 13 side is used by him since the beginning of the occupation of his shop and the entrance has two wide doors and they are in use till the date of the certificate. I have already pointed out that the plaintiff has led no evidence whatsoever to support his case of easement. On the contrary the tenant who could have been affected by the said stall himself states that by the said suit stall there is no obstruction to his air and light. In view of this, according to me, there is no substance in the contention raised by the plaintiff that by the said suit stall his air and light are affected. Shri Jahagirdar, learned Counsel for the plaintiff, contended that in fact relations between the tenant R. C. Mehta and the plaintiff are strained and, therefore, he has obliged defendant No. 3 by giving the aforesaid certificate. Even presuming what Shri Jahagirdar has stated is correct, still the fact remains that there is no complaint from the person who was likely to be affected by the said stall that his right of air and light was affected by the said stall.

15. In view of this, I dismiss the cross-objections filed by the plaintiff and confirm the judgment and decree to that effect passed by the trial Court dated 9th September, 1991 in Short Cause Suit No, 948 of 1983.

16. With this now I will turn to the main contentions raised by the plaintiff on one

hand and the defendants on the other hand. Before analysing the oral and documentary evidence as led by both the parties, I will like to deal with certain observations made by the trial Court in its judgment dated 30th August, 1988 wherein the trial Court came to the conclusion that the tea stall is unauthorised structure.

17. Shri Sawant, learned Counsel for defendant No. 3, and Shri Walawalkar, learned Counsel for defendants Nos. 1 and 2 strenuously contended that while giving the aforesaid finding the trial Court completely misconstrued the documents and also completely lost sight of certain admissions given by the plaintiff and, therefore, the said finding and the conclusion arrived at by the trial Court are liable to be set aside.

18. On the other hand Shri Jahagirdar, learned Counsel for the plaintiff, contended that the documents adduced by defendants Nos. 1 and 2 on record in fact support the conclusions of the trial Court and, therefore, the said finding should be confirmed.

19. The trial Court in its judgment dated 30th August, 1988 came to the conclusion that defendant No. 3 sought permission for the tea stall at some other place than the place where he has erected the present stall. Secondly, the trial Court came to the conclusion that the permission was sought for smaller stall while in fact defendants No. 3 has constructed larger stall. The trial Court also came to the conclusion that defendant No. 3 was not asked to make use of the electricity, water connection and drainage connection, but in breach of the said direction, defendant No. 3 obtained water connection, electricity connection and drainage connection. The trial Court also held that for getting the aforesaid permission for erection of the stall, wrong information was given to defendant No. 2 at the connivance of the Municipal Officers. In view of the aforesaid conclusions, the trial Court held that the stall erected by defendant No. 3 was unauthorised stall liable to be demolished.

20. The first important question according to me is as to whether defendant No. 3 has erected the tea stall at the place where he sought the permission. At this stage I must point out that in the plaint filed by the plaintiff though the plaintiff has stated that the stall erected by defendant No. 3 is unauthorised, nowhere in the plaint the plaintiff has given the specific reason as to why he could call the erection of the said stall constructed by defendant No. 3 as unauthorised. Shri Jahagirdar, learned Counsel for the plaintiff, strenuously contended that the plaintiff being outsider had no access to the documents and correspondence entered into inter alia between defendants Nos. 1 and 2 on one hand and defendant No. 3 on the other hand. After filing the suit, defendants Nos. 1 and 2 produced the documents and by relying on the aforesaid documents the plaintiff amended the plaint and raised certain contentions. However, I find that even after going through the documents produced by defendants Nos. 1 and 2 and thereafter amending the plaint, there is no specific plea as regards the illegality or unauthorised erection of the tea stall. Apart from that, after the documents

were produced by defendants Nos. 1 and 2 and after scrutinising the documents filed by defendants Nos. 1 and 2, the plaintiff carried out amendment to the plaint and thereafter the plaintiff stepped in the witness box. Against this background it is clear that when the plaintiff stepped in the witness box, he was aware of all the factual aspects and, therefore, there is no reason whatsoever on the part of the plaintiff not to come with the specific case, more particularly when he is the owner of the building adjoining to the stall and he is residing on the 4th floor of the said building. In view of this background, I will just point out the case made out by the plaintiff in his deposition.

21. In para 2 of his deposition the plaintiff has stated:

"The structure regarding which I have a grievance is at the entrance of Jambulwadi just touching my building. I first noticed that structure in the beginning of March, 1982."

Thereafter in para 3 of his deposition, the plaintiff stated:

"Prior to 1982 there was a small sugarcane crusher at the same place. It must be about 1 metre x 3/4 metre which is the normal size of space occupied by a sugar cane crusher. The present structure occupies the space of 10" x 9" and height of 10 feet."

In para 7 of his deposition, the plaintiff has stated:

"I am told that the objected structure is not in compliance with the rules and bye-laws of the Building Regulation of Bombay Municipal Corporation. My surmise is that the sanction for the objected structure is not for the place at which it has been put up."

This is all the plaintiff has stated in his deposition with reference to the tea stall of defendant No. 3. From this deposition there is no iota of evidence to show that the sanctioned structure is not for the place at which it has been put up, excepting the sentence to the effect that "My surmise is that the sanction for the objected structure is not for the place at which it has been put up". This statement itself shows that this witness has no knowledge whatsoever as to where the sanction of erection of stall was sought for and where it is erected. In view of this deposition, in the background of the vague contentions raised in the plaint including the amended portion thereof, according to me, the plaintiff's case should fail as he has led no evidence whatsoever, to show that the structure is unauthorised.

22. However, I will like to consider the argument as advanced by Shri Jahagirdar, learned Counsel for the plaintiff, to the effect that if on the basis of the documents as filed and exhibited by defendants Nos. 1 and 2, the plaintiff is in a position to show that the stall was unauthorised or the stall was permitted without any authority, then in that event the plaintiff is entitled to rely on the said documents to support his contention. With respect to the arguments advanced by the learned Counsel on behalf of the plaintiff, it is difficult to accept

the aforesaid proposition in view of the plaint as amended filed by the plaintiff and his admissions in his deposition, as the defendants had no opportunity to give their explanation in respect of the aforesaid documents. Even presuming for a while that the plaintiff is entitled to rely on the documents filed by defendants Nos. 1 and 2 to support his contention, according to me, even these documents do not support the contention made by the plaintiff. In this case admittedly prior to 1982 defendant No. 3 was carrying on his business of sugarcane juice at the spot where the present strait is erected by defendant No. 3. This is admitted by the plaintiff in paragraphs 2 and 3 of his deposition. The plaintiff has also produced certain photographs which are at Exh. "E" collectively. The last two photographs relied upon by the plaintiff also shows the position of sugarcane juice stall at the same place where the present stall is erected by defendant No. 3. It is with this background we have to see the documents adduced by defendants Nos. 1 and 2.

23. All these documents are produced by defendants Nos. 1 and 2 at Exh. 2 collectively. The document dated 14-9-1974 is a certificate given by the Ward Officer "C" Ward, where he has stated that defendant no. 3 is carrying on trade of sugarcane crusher at opposite 10/12 Jambulwadi Junction, Kalbadevi Road, on municipal road and his application for licence is in consideration. In view of this certificate, it is clear that the 3rd defendant was carrying on business opposite 10/12 Jambulwadi Junction. It is true that opposite to 10/12 Jambulwadi is Shop No. 9/11. However, as pointed out earlier from the admission of the plaintiff in his deposition and also from the photographs produced by the plaintiff, it is clear that the tea stall erected by the 3rd defendant is at the junction of Jambulwadi and Kalbadevi Road adjoining to the plaintiffs building. Therefore, it appears that when the aforesaid document dated 14-9-1974 refers to the place where the 3rd defendant was carrying on sugarcane juice business at opposite 10/12 Jambulwadi, then that docs not literally mean that it is opposite 10/12 Jambulwadi, but this was rather a vague description. Shri Sawant, learned Counsel for defendant No. 3, contended that earlier defendant No. 3 was residing in building 9/12 on 4th floor and, therefore, the 3rd defendant" used to refer to in his correspondence his address as 9/11 Jambulwadi and, therefore, in his correspondence inadvertently reference is made to the place near 9/11 Jambulwadi. This appears to be the correct position, as this is supported by several documents. As pointed out earlier the plaintiff in this case is the owner of the building adjoining to the place where defendant No. 3 was carrying on the sugarcane juice business and if really he had been carrying on the business near building No. 9/11, then in that case the plaintiff would have referred the same in his plaint as well as in his deposition. On the contrary as pointed out above, the plaintiff in his deposition clearly stated that defendant No. 3 was carrying on sugarcane juice business prior to 1982 at the same place where the disputed stall is erected by defendant No. 3. So it appears that in all the municipal correspondence and certificates, though defendant No. 3 was carrying on the business of sugarcane juice at the place where the tea stall is erected by

defendant No. 3, inadvertently reference is made to the sugarcane juice stall with reference to building No. 9/11. Once we come to the conclusion by reliance on the admissions of the plaintiff and photographs relied upon by the plaintiff that the sugarcane juice business was carried on at the same place where the present disputed stall is erected by defendant No. 3, then it is clear that till 1983 defendant No. 3 was carrying on the business of sugarcane juice at the junction of Kalbadevi and Jambulwadi road and not near the dead end of Jambulwadi as concluded by the trial Court.

24. Thereafter on 3rd February 1982 defendant No. 3 applied for grant of permission for sugarcane stall, Exh. "B-2" collectively. In the said application the 3rd defendant specifically stated that he intended to start tea stall business at the same place where he was carrying on sugarcane business. In the said application he has further stated that for conducting tea stall he will require minimum structure of 3 metres x 2 metres and, therefore, he requested the Ward Officer to increase the dimension of the existing structure of 1 metre x 1 metre to 3 metres x 2 metres. It is on the basis of this application with certain correspondence ultimately permission to erect sugarcane stall was granted to defendant No. 3 on 5th May, 1984. The aforesaid discussion clearly shows that at no point of time defendant No. 3 carried on business at a place other than where he has erected the disputed structure. It appears that since defendant No. 3 was residing at address 9/11 Jambulwadi, in the correspondence with the Municipal Corporation defendant No. 3 referred the address of sugarcane juice business and tea stall as near building 9/11. Therefore, with respect, the trial Court was wrong in coming to the conclusion that defendant No. 3 sought permission for the place near the dead end of Jambulwadi, but in fact erected the tea stall near the junction and the municipal officers connived at it.

25. Shri Jahagirdar, learned Counsel for the plaintiff has further contended that defendant No. 3 was given licence to erect the tea stall as a temporary structure, but in fact defendant No. 3 has erected permanent structure by permanently embedding a wooden tea stall erected by him in the earth. Further while giving permission, defendant No. 3 was not allowed to take water connection and electricity connection but the same was taken by him unauthorisedly and lastly defendant No. 3 has also connected drainage line to waste water. Because of the aforesaid unauthorised excess committed by defendant No. 3, according to Shri Jahagirdar, defendant No. 3, has erected a permanent structure and such structure cannot be allowed under S. 313 of the Bombay Municipal Corporation Act.

26. Shri Walawalkar, learned Counsel for defendants Nos. 1 and 2, and Shri Sawant, learned Counsel for defendant No. 3, contended that after obtaining the permission for tea stall, while erecting the tea stall defendant No. 3 embedded the wooden structure in concrete to protect the wood. However, when the same was brought to the notice of the Municipal Corporation, the Municipal Corporation gave notice to defendant No. 3 and directed him to segregate the embedded

wooden structure from the ground. While the said objection was pending, defendant No. 3 applied to the Ward Officer for grant of no objection in getting connection of electricity and water connection, but in view of the breach committed by defendant No. 3 by embedding the wooden stall in the earth, his application was rejected by the Ward Officer on 24th November, 1982. However, as per the direction of Municipal Corporation, defendant No. 3 removed the concrete on which the wooden structure was fixed and thereafter further applied to the Municipal Corporation for grant of no objection for getting electricity and water connection. Since defendant No. 3 complied with the directions given by the Municipal Corporation and rectified the breach of condition of the licence, his aforesaid request was considered favourably by defendants Nos. 1 and 2 after protracted correspondence. After obtaining the said no objection certificate from defendants Nos. 1 and 2, defendant No. 3 took the water and electricity connections for which he is paying regularly. It is pertinent to note that after complying with the directions as given by the Municipal Corporation, the wooden stall erected by defendant No. 3 ceased to be Immovable structure and, therefore, defendants Nos. 1 and 2 were within their limits to consider the application of erection of wooden stall or to consider the application for continuation of the wooden stall within the ambit of S. 313 of the Bombay Municipal Corporation Act. From the aforesaid discussion, it is apparent that the electricity connection and water connection were taken by defendant No. 3 after obtaining no objection as per the rules.

27. It was also argued by Shri Jahagirdar, learned counsel for the plaintiff, that defendant No. 3 has connected waste water from his tea stall to the drainage unauthorisedly. Shri Walawalkar, learned counsel for defendants Nos. 1 and 2, referred to the permission dated 30-4-1984 granted by the Municipal Corporation to defendant No. 3 for conducting the tea stall. In the said permission in clause 6(a) in fact defendant No. 3 has to make drainage arrangement for draining the waste water and, therefore, by connecting the waste water from the tea stall to the drainage, defendant No. 3 has not committed any breach. I may further mention that by merely getting electricity, water and drainage connection temporary structure does not become permanent structure. The Municipality has clearly given permission to erect a temporary stall and the permission of user of the ground which is to be renewed from time to time.

28. From the aforesaid discussion, it is clear that the permission granted by the Municipal Corporation to erect the tea stall to defendant No. 3 was only for the purpose of erecting the temporary structure. Shri Jahagirdar has taken me through several, provisions of the Bombay Municipal Corporation Act and after referring to the said rules, contended that the structure erected by defendant No. 3 being permanent, defendant No. 2 had no authority to grant such permission. At the outset I may point out that all these contentions are conspicuously lacking in the plaint as amended filed by the plaintiff and, therefore, accepting these contentions at this stage will virtually amount to snatching away the opportunity from defendants Nos. 1 and 2 to explain the position from their point of view.

However, according to me, even this argument as advanced by Shri Jahagirdar on behalf of the plaintiff is of no consequence. In view of the discussion made earlier, as the stall erected by defendant No. 3 is purely temporary structure and not permanent one. Apart from that I may point out that it is admitted by the plaintiff that even the standing committee has given sanction to the aforesaid tea stall erected by defendant No. 3. In view of this, there is no substance in the argument advanced on behalf of the plaintiff that the stall erected was an Immovable structure and the Municipal Commissioner had no authority to give the permission.

29. Shri Jahagirdar further referred to the authority of Madras High Court in K. Sudarsan and Others Vs. The Commissioner, Corporation of Madras and Others, , wherein Madras High Court observed (at p. 298) :--

"The highway is a passage over which members of the public are entitled to pass and repass. The essential characteristic of the highway is that every person should have the right to use for the appropriate kind of traffic..... The right of the public to pass and repass extends over the whole width of the highway or the street, in other words over every inch of the street. A member of the public cannot be compelled to confine himself to a part of the street at the choice of another."

According to me, the facts and circumstances of that case are completely different from the facts and circumstances in the present case. Apart from that, if one reads Para 15 of the said Judgment, Madras High Court further held :--

"Under S. 223(1) the Commissioner has got the power to grant a licence to the owner or occupier of any premises to put up certain projections or constructions. But such projection or construction shall not be likely to be injurious to health or cause public inconvenience or otherwise materially interfere or result in material interference with the use of the road as a road. On the expiry of the period of the licence the projection or temporary construction is likely to be removed."

After going through the aforesaid observations, it is clear that Madras High Court has observed that even on the high way the Commissioner under the said Act can grant permission provided it is not going to cause injury or inconvenience to the public. In the present case, the disputed structure is in a bye-lane which is about 125 ft. with completely dead end on the other side. In the present case there is no evidence whatsoever led by the plaintiff to show that the said structure caused any inconvenience or any nuisance or injury to the public. In view of this, according to me, this authority does not support the plaintiff.

30. Apart from that, the observations made by the Supreme Court in Sodan Singh and etc. etc. v. New Delhi Municipal Committee etc. AIR 1989 SC 1988 : 1988 All LJ 1097 also support the case of the defendants. The Supreme Court in the aforesaid Judgment observed (at page 1995 (of AIR)) :--

"The right to carry on trade or business mentioned in Art. 19(1)(g) on street

pavements, if properly regulated cannot be denied on the ground that the streets are meant exclusively for passing or re-passing and for no other use. The right if properly regulated according to the exigency of the circumstances, the small traders on the sidewalks can considerably add to the comfort and convenience of general public, by making available ordinary articles of every day use for a comparatively lesser price. An ordinary person, not very affluent, while hurrying towards his home after day's work can pick up these articles without going out of his way to find a regular market. If the circumstances are appropriate and a small trader can do some business for personal gain on the payment to the advantage of the general public and without any discomfort or annoyance to the others there cannot be any objection to his carrying on the business."

In the light of the aforesaid observations of the Supreme Court in the present case the Municipality has granted the permission to defendant No. 3 having a very meagre income, to convert his sugarcane juice business (which he was carrying on from the year 1970 at the same place) to a teat stall so that he can earn more money to augment his expenses. The structure permission for which is granted is purely temporary wooden structure and while granting the said permission all the pros and cons have been taken into consideration by defendants Nos. 1 and 2 to see that there is no inconvenience to the public and to the traffic. As pointed out earlier, the said structure is on the side line in the lane which is hardly 125 ft. in length with a dead end on the other side. There is no evidence on the record that the said structure has caused any inconvenience to the public at large. In view of these facts more particularly in the light of the Supreme Court observations, according to me, defendants Nos. 1 and 2 used their discretion in a deserving case by allowing defendant No. 3 to erect temporary structure. In any case since the discretion is exercised by defendants Nos. 1 and 2 under S. 313 of the Bombay Municipal Corporation Act, this is not the case where the Court should interfere with the said discretion.

31. Lastly it is argued on behalf of defendants Nos. 1 and 2 by learned Counsel Shri Walawalkar and also on behalf of defendant No. 3 by his learned Counsel Shri Sawant, that the suit filed by the plaintiff is not maintainable in view of S. 527 of the Bombay Municipal Corporation Act as the plaintiff has failed to comply with clause (b) of S. 527(1). On the other hand, Shri Jahagirdar, learned Counsel for the plaintiff, contended that there is no breach of clause (b) of S. 527(1). In order to understand the rival contentions, it is desirable to see the provisions as envisaged by S. 527 which are as under:--

"527. (1) No suit shall be instituted against the corporation or against the Commissioner, the General Manager or the Director or a Deputy Commissioner, or against any municipal officer or servant, in respect of any act done in pursuance or execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act--

(a) until the expiration of one month next after notice in writing has been, in the case of the corporation, left at the chief municipal office and, in the case of the

Commissioner, the General Manager or the Director or of a Deputy Municipal Commissioner or of a municipal officer or servant delivered to him or left at his office or place of abode, stating with reasonable particularity the cause of action and the name and place of abode of the intending plaintiff and of his attorney or agent, if any, for the purpose of such suit; nor

(b) unless it is commenced within six months next after the accrual of the cause of action."

After going through the aforesaid provisions, it is clear that no suit can be instituted against the Municipal Corporation or against the Commissioner or General Manager, Deputy Commissioner or against any Municipal Officer or servant in respect of any act done in pursuance of execution or intended execution of the Act or in respect of any alleged neglect or default in the execution of this Act without complying with S. 527. In the facts and circumstances of this case clause (1) of S. 527 is attracted and, therefore, we have to see that before filing the suit whether the plaintiff has complied with S. 527(1) clause (a) and S. 527(1) clause (b). In the present case the plaintiff addressed notice to the Municipal Commissioner on 11th June, 1982. The said notice was received by the Municipal Commissioner on 14th June, 1982, and the plaintiff has filed the suit on 3rd February, 1983. From the aforesaid facts it is clear that the plaintiff has complied with S. 527(1)(a) as he has filed the suit after the lapse of one month from 14th June, 1982. However, it is contended on behalf of the defendants that the plaintiff has failed to comply with S. 527(1)(b) as he has not filed the suit within seven months from 14th June, 1982. As per cl. (b) of S. 527(1) it is incumbent upon the plaintiff to file the suit within six months after the accrual of cause of action. In view of S. 527(1) (a) only after expiry of one month from the date of the receipt of the notice by the Commissioner given by the plaintiff under S. 527(1)(a) the cause of action accrued in the present case. Admittedly the notice dated 11th June, 1982 given by the plaintiff to defendants Nos. 1 and 2 was received by defendants Nos. 1 and 2 on 14th June 1982. From that day, in view of the provisions of S. 527(1) (a) the plaintiff can file suit only after expiry of one month and, therefore, accrual of cause of action to the plaintiff against defendants Nos. 1 and 2 was on 14th July, 1982. This being the date of accrual of cause of action on the part of the plaintiff against defendants Nos. 1 and 2 in view of S. 527(1)(b), the plaintiff ought to have filed the suit on 14th January, 1983. However, the plaintiff has filed this suit on 3rd February, 1983, i.e. the said suit was filed by the plaintiff against defendants Nos. 1 and 2 after expiry of six months from the accrual of cause of action. From the phraseology used in S. 527 of the B.M.C. Act, no suit shall be instituted against the Municipal Corporation or against the Commissioner without complying with the conditions as laid down in S. 527(1)(a) and S. 527(1) (a). The present suit filed by the plaintiff, therefore, is in breach of S. 527(1)(b) and is, therefore, liable to be dismissed.

32. Shri Jahagirdar, learned Counsel for the plaintiff, made two-fold submissions

on this count. Firstly, it was argued by Shri Jahagirdar that from the Judgment it appears that defendants Nos. 1 and 2 waived the notice and secondly installation of the unauthorised construction is recurring and/or continuous cause of action and, therefore, S. 527(1)(b) is inapplicable in the present case. For the purpose of showing that defendants Nos. 1 and 2 waived the notice, the plaintiff relied on the observations made by the trial Court in his Judgment dated 30th August 1988 wherein the trial Court observed at p. 55 that defendants Nos. 1 and 2 waived the notice given by the plaintiff under S. 527(1)(a) of the B. M. C. Act. It is true that the learned Judge has made the aforesaid observations, but from the record factually it appears that at no stage defendant No. 1 and/or 2 waived the statutory notice. In the written statement filed by defendants Nos. 1 and 2 in para 1, defendants Nos. 1 and 2 have stated that the notice given by the plaintiff dated 11-6-192 under S. 527 of the B.M.C. Act is not valid, legal notice and the same is not binding on these defendants. Further in the amended written statement of defendants Nos. 1 and 2, which is at page 236 of the paperbook, has specifically stated:

"These defendants once again repeat and reiterate that the present suit is barred by limitation under S. 527(1)(b) of the Bombay Municipal Corporation Act. These defendants deny that this Honourable Court has discretion and right to condone the delay in filing the present suit."

From the aforesaid averment made by defendants Nos. 1 and 2 in their written statement it is difficult to conceive of an idea that defendants Nos. 1 and 2 have waived notice under S. 527. In any case there is nothing in the written statement as well as deposition of witness examined on behalf of defendants Nos. 1 and 2 to corroborate such waiver. Apart from the aforesaid factual position, according to me, in the facts and circumstances of the present case there is no question of applicability of doctrine of waiver, as already discussed earlier the plaintiff in the present case has filed his suit after the expiry of one month from the receipt of the notice by defendants Nos. 1 and 2 given by the plaintiff under S. 527(1). Since the plaintiff has given notice as per the requirement under S. 527(1)(a), there was no question of waiver of the said notice on the part of defendants Nos. 1 and 2. Therefore, with respect, there is no substance in the arguments advanced on behalf of the plaintiff that defendants Nos. 1 and 2 waived the notice and due to waiver, provisions of S. 527(1)(b) are inapplicable.

33. As regards the second argument on behalf of the plaintiff that erection of the disputed tea stall being continuous cause of action, provisions of S. 527(1)(b) of the B.M.C. Act are inapplicable, a mere look at the plaint will show the futility of this argument. The plaintiff has filed the suit mainly for a declaration that the tea stall erected by defendant No. 3 is unauthorised structure and in encroachment on the property of the plaintiff. It is true that the plaintiff has also claimed other reliefs but they are all incidental reliefs i.e. if the plaintiff is entitled to get the declaration which he sought for under clause 20(a) of the prayer clauses, then only he is entitled to get the incidental reliefs. However, since I have come to the

conclusion that the stall erected by the plaintiff is authorised and is not encroachment on the property of the plaintiff, the plaintiff is not entitled to get any one of the incidental reliefs which are in the nature of continuous cause of action. In this view of the matter, according to me, there is no substance in the argument advanced by the plaintiff that in the present case provisions under S. 527(1)(b) are not attracted as the cause of action alleged by the plaintiff is a continuous cause of action. The trial Court's observations to the effect that provisions under S. 527(1)(b) are not applicable in the present case will have to be set aside in the light of the aforesaid discussion.

34. Hence in the light of the abovementioned observations, I am setting aside the findings arrived at by the City Civil Court, Bombay, in its Judgment dated 29th/30th August, 1988. I also set aside the Judgment and decree dated 9th September 1991 passed by the Judge, City Civil Court, Bombay, confirming the issues decided by the City Civil Court in its earlier decision dated 29th/30th August, 1988 and dismiss the Suit filed by the plaintiff by allowing First Appeal No. 1086 of 1991 with no order as to costs.

35. In view of the aforesaid decision, defendants Nos. 1 and 2 are directed to hand over the key of the disputed stall erected by defendant No. 3 to defendant No. 3.

36. In view of the Judgment given by me in First Appeal No. 1086 of 1991, First Appeal No. 121 of 1993 is allowed and the same order is passed as in First Appeal No. 1086 of 1991.

37. I dismiss Cross-Objections No. 8695 of 1993 filed by the plaintiff in First Appeal No. 121 of 1993 and confirm the Judgment and decree to that effect passed by the trial Court dated 9th September, 1991 in Short Cause Suit No. 948 of 1983.

38. Certified copies to be supplied immediately.

39. Advocates to act on the ordinary copy of the order.

Order accordingly.